

**NOVA SCOTIA COURT OF APPEAL**

**Citation: *R. v. Buckley*, 2012 NSCA 108**

**Date:** 20121002

**Docket:** CAC 354572

**Registry:** Halifax

**Between:**

Joseph Patrick Buckley

Applicant/Appellant

v.

Her Majesty the Queen

Respondent

**Judge:** Justice David P.S. Farrar

**Motion Heard:** September 26, 2012, in Halifax, Nova Scotia, in  
Chambers

**Held:** Motion for appointment of counsel denied.

**Counsel:** Appellant in person  
James Gumpert, Q.C., for the respondent  
Stacey Gerrard for Luke Craggs  
Edward Gores, Q.C. for the Attorney General of Nova  
Scotia

## **Decision:**

### **Introduction**

[1] The appellant applies for the appointment of counsel under s. 684 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 to assist him in prosecuting his appeal. For the reasons that follow I deny the request.

### **Background**

[2] On June 21, 2011, the appellant was convicted of two counts of sexual assault on two individuals, both under the age of 14 years, contrary to s. 271(1)(a) of the **Criminal Code**.

[3] The appellant was represented during the time of his remand and his trial by judge and jury heard in Halifax over the summer of 2011.

[4] In his affidavit in support of this motion and in his Notice of Appeal, the appellant relies on only one ground of appeal, that is, he was not adequately represented by counsel during trial and, therefore, did not receive a fair trial. He sought and was denied legal aid for the prosecution of this appeal.

### **Issue**

[5] The issue is whether the appellant has met the prerequisites of s. 684 of the **Criminal Code**.

### **Analysis**

[6] Section 684 of the **Criminal Code** provides:

#### **Legal assistance for appellant**

**684.** (1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal

assistance and where it appears that the accused has not sufficient means to obtain that assistance.

### **Counsel fees and disbursements**

(2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.

[7] Hallett, J.A. formulated the test on this type of application in **R. v. Grenkow** (1994), 127 N.S.R. (2d) 355 (C.A.). To be successful, an applicant must show that legal aid has been refused, that there is a reasonable chance of the appeal succeeding and that a fair hearing cannot be had without the assistance of counsel:

17 In my opinion the test under s. 684 must be as set out in the words of the section, that is, does it appear desirable in the interest of justice that the accused should have legal assistance and that the accused has not sufficient means to obtain the same. If legal aid has been refused by Nova Scotia Legal Aid counsel should only be assigned if the court is satisfied that there is a reasonable chance of the appeal succeeding; the appellant must do more than raise an arguable issue.

[8] In **R. v. J.W.**, 2011 NSCA 76, Fichaud, J.A. (in Chambers) summarizes the test as follows:

11 Under s. 684(1), literally I have two inquiries - - (1) whether it is desirable in the interests of justice that J.W. have legal assistance, and (2) whether J.W. has sufficient means to obtain that assistance. *R. v. Assoun*, 2002 NSCA 50, paras. 41-44. In *R. v. Innocente*, [1999] N.S.J. No. 302, paras. 10-12, Justice Freeman agreed with the statement of Justice Doherty in *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123 (Ont. C.A.), para 22, that, in addition, the chambers judge should be satisfied that the appellant has an arguable appeal.

[9] It is apparent on the information Mr. Buckley has provided to the Court that he lacks the means to otherwise retain counsel. Therefore, I am only left to complete the “interests of justice analysis”. Cromwell, J.A. (as he then was) noted in **R. v Assoun**, 2002 NSCA 50, this inquiry involves a number of considerations including: (i) the merits of the appeal; (ii) its complexity; (iii) the appellant’s capability; and (iv) the court’s role to assist. Chief Justice MacDonald in **R. v.**

**Morton**, 2010 NSCA 103 added an additional consideration, that is, the responsibility of Crown counsel to ensure that the applicant is treated fairly (¶5).

[10] Is it in the interests of the administration of justice that the appellant have legal assistance for the purpose of preparing and presenting his appeal?

### **Merits of the Appeal**

[11] The appellant's sole ground of appeal is that he says he was inadequately represented by his counsel over the course of a 9-day trial.

[12] The appeal book, particularly the trial transcript and the sentencing decision, discloses that the defence counsel was very active in his representation of the appellant throughout the trial. The transcript discloses extensive cross-examination by defence counsel of the two complainants and of the witnesses put forward by the Crown. Further, defence counsel, by direct examination of the appellant/defendant, put Mr. Buckley on the witness stand so he could put his version of events to the judge and jury. Defence counsel conducted, what appears to be, an appropriate re-direct examination of the appellant at trial.

[13] The transcript also discloses that defence counsel made what appeared to be appropriate submissions to the jury upon the conclusion of the evidence and that counsel had a theory of the defence that was apparent and transparent: he reviewed the evidence and focused on the various inconsistencies and illogical aspects of the testimony of the Crown witnesses while actively putting forward his client's denial of the charges together with his client's other testimony in a cogent and compelling manner. That a jury chose to convict on the evidence is not, in itself, evidence of inadequate representation by counsel.

[14] It is difficult to conclude that the appellant has an arguable appeal. However, at this stage of the proceeding, it would be difficult to deny the motion solely because there appears to be no arguable issue. I prefer to move on to the remaining criteria which would result in the motion being denied regardless of the merits of the appeal.

### **Complexity of the Appeal and the Appellant's Capability**

[15] The appellant has a grade 12 education. His pre-sentence report discloses that the appellant completed his Grade 12 G.E.D. at Musquodoboit High School in 1984 and that he obtained “good grades” with a “B” average. He has the ability to put in writing his various concerns and issues in support of his grounds of appeal. He appears to have the ability to understand the written word, comprehend the applicable legal principles, and to relate those principles to the facts of his case. He can adequately express what it is he is seeking: **R. v. J.W., supra**, ¶13. He has no issues communicating with others and appears to be sufficiently familiar with court procedures. He does not disclose any incapacity or inability to present his own appeal.

[16] The motion material and the Notice of Appeal show that the appellant can articulate the issues of concern to him. He has provided an extensive review in his affidavit of where and how his counsel failed to adequately represent him. There is nothing which appears to be complex in this matter and which requires the assistance of counsel on the appeal in order for the appellant to be able to articulate the reasons for his appeal. In his affidavit he has given examples of where he is of the opinion his counsel did not do as he wished him to do in respect of the evidence. This discloses that the appellant is capable of articulating the reasons for his appeal.

### **The Court's Role**

[17] In **R. v. Grenkow, supra**, Justice Hallett describes this Court's role in appeals involving self-represented individuals:

26 ... the reality is that on an appeal from conviction or sentence where the appellant appears in person, the appeal panel hearing the appeal will carefully address the issues raised by the appellant. The panel will have the trial record and the panel members will have reviewed the record of the proceedings. If the points raised on the appeal have merit the appeal will be allowed notwithstanding the possible imperfect presentation of argument by the appellant. ...

[18] I am satisfied with the appellant's ability to express himself and to articulate to the Court his concerns with his counsel's representation. I am confident that this

Court's review of the record will reveal any problems with the representation of the appellant at trial and it will be appropriately addressed.

### **The Crown's Role**

[19] It is the Crown's duty to ensure that the appellant is treated fairly. In **R. v. Morton, supra**, Chief Justice MacDonald quoted from **Boucher v. The Queen**, [1955] S.C.R. 16 as follows:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

[20] As in all cases, we would expect the Crown in this case to assist the Court in ensuring the appellant receives a fair appeal.

### **Conclusion**

[21] This appeal is not complex. The appellant is relying on only one ground of appeal; ineffective assistance of counsel. He is capable, as is evident from his affidavits and appearance before me, to articulate his concerns with his counsel's representation. With our careful review of the records the Crown's additional oversight, I am satisfied that the appellant can effectively present his appeal without the assistance of counsel.

[22] For all of these reasons I do not find it to be in the interest of justice to assign counsel. The motion is dismissed.

Farrar, J.A.